

73 FLRA No. 24

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

FEDERAL COMMUNICATIONS COMMISSION
(Agency)

0-AR-5731
0-AR-5780

DECISION

June 30, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members
(Chairman DuBester concurring)

I. Statement of the Case

In this consolidated decision, we consider the Union’s exceptions to two awards with a shared factual predicate.¹

During renegotiation of the parties’ collective-bargaining agreement, the Agency declared the parties at impasse and requested mediation. When mediation failed, the Agency requested the assistance of the Federal Service Impasses Panel (the Panel). The Union grieved the Agency’s insistence to impasse, claiming that no impasse existed and that the Agency had improperly insisted to impasse on permissive subjects of bargaining. Arbitrator Barry E. Shapiro denied the grievance (Shapiro award), and the Union filed exceptions.

Following issuance of the Panel’s order, the Agency sent the agreement with the Panel-imposed wording (the compiled agreement) to the Union for execution. Citing its then-unresolved grievance before Arbitrator Shapiro, the Union refused to execute the compiled agreement. The Agency grieved this refusal. Arbitrator Daniel A. Silverman sustained the grievance (the Silverman award), finding that the Union failed to

timely execute a completed agreement. The Union filed exceptions to this award too.

For the reasons that follow, we dismiss, in part, and deny, in part, the Union’s exceptions to the two awards.

II. Background and Arbitrators’ Awards

Before beginning negotiations on a collective-bargaining agreement, the parties agreed to ground rules for the negotiations (the ground rules). As relevant here, the ground rules provide that “if agreement is not reached after eight . . . weeks and the parties have exhausted all efforts to reach agreement,” then the parties will engage in mediation or impasse procedures “unless the [p]arties mutually agree to engage in additional bargaining.”²

On May 7, 2020, after ten weeks of bargaining, the Agency sent the Union its last, best offer on seven outstanding proposals and declared the parties at impasse. The Agency then requested the services of a mediator from the Federal Mediation and Conciliation Service. Claiming no impasse existed, the Union objected to the mediation and asserted during mediation that the parties should continue bargaining without the assistance of a mediator. When mediation failed to resolve the parties’ remaining disagreements, the Agency asked the mediator to release the parties.

After the mediator released the parties, the Agency requested the Panel’s assistance. The Panel asserted jurisdiction and directed the parties to resume mediation. During this second mediation, the parties agreed on some of the outstanding proposals. Subsequently, the Panel issued a decision and order resolving the remaining proposals.

While the Agency’s request for Panel-assistance was pending, the Union grieved the Agency’s declaration of impasse, claiming that the parties were not at impasse and that the Agency had improperly insisted to impasse on proposals concerning permissive subjects of bargaining. When the parties were unable to resolve the grievance, the Union invoked arbitration.

A. The Shapiro Award

Arbitrator Shapiro framed the issues, as relevant here, as (1) whether the Agency violated the Federal Service Labor-Management Relations Statute

¹ As this case involves two sets of exceptions challenging related arbitration awards between the same parties, we consolidate them for review. *See U.S. Dep’t of the Air Force, Scott Air Force Base, Ill.*, 72 FLRA 526, 526 n.1 (2021) (Chairman DuBester

concurring) (consolidating exceptions involving same parties and arising from the same facts).

² Shapiro Award at 2.

(the Statute) or the ground rules by declaring impasse on May 7, 2020, and (2) whether the Agency violated the ground rules by insisting to impasse on permissive subjects of bargaining.

At arbitration, the Union referenced several Agency actions that allegedly demonstrated that the Agency had negotiated in bad faith. Article 39 of the parties' agreement provides that "[i]sues not raised by the [p]arties during the grievance procedure may not be raised by either [p]arty or the arbitrator."³ Applying Article 39, Arbitrator Shapiro determined that, while some of the Agency's actions before May 7 "may inform a judgment about whether the [p]arties were actually at an impasse,"⁴ the Union had not raised these actions in its grievance. Thus, Arbitrator Shapiro found that the question of whether these individual actions constituted unfair labor practices was outside the scope of arbitration.

On the merits, Arbitrator Shapiro considered the "overall state of the bargaining at the time [the] impasse [wa]s declared,"⁵ including such factors as the length of the negotiations, the number of proposals exchanged, the types of proposals discussed, and the parties' conduct during bargaining.⁶ Noting that the parties' ground rules permit either party to invoke mediation after eight weeks, Arbitrator Shapiro found that the Agency's declaration of impasse on May 7 was not "premature or made in bad faith."⁷

The Union also argued that the parties were not "deadlocked on all outstanding proposals" when the Agency requested that the mediator release the parties from the first mediation.⁸ Arbitrator Shapiro found that it was "impossible to know" whether further mediation could have been productive and refused to "engage in speculation" on the subject.⁹ However, Arbitrator Shapiro concluded that the Agency was "justified under the ground rules" in requesting that the mediator release the parties because the "failure of the mediation process to produce any meaningful advances was based largely" on the

Union's refusal to cooperate with the Agency or the mediator.¹⁰ Arbitrator Shapiro also determined that the Agency did not insist to impasse on any permissive topics.¹¹

The Union filed exceptions to the Shapiro award on May 11, 2021, and the Agency filed an opposition on June 10, 2021.

B. The Silverman Award

While the Union's grievance was pending before Arbitrator Shapiro, the Agency sent the Union the compiled agreement for execution. Citing its active grievance, the Union refused to execute the agreement. The Agency then grieved the Union's refusal as a violation of the parties' ground rules. When the Union denied the grievance, the Agency invoked arbitration and the dispute proceeded to Arbitrator Silverman.

At arbitration, the parties stipulated to the following issues: Whether the Union had breached a provision of the ground rules requiring the Union to execute completed agreements, and if so, what should be the remedy?

The Union argued that it had not breached the ground rules, because the Agency's bad-faith bargaining prevented the parties from completing negotiations. Citing the doctrine of *res judicata*, Arbitrator Silverman adopted Arbitrator Shapiro's finding that the parties had reached a genuine impasse. And, as the parties had completed negotiations with the assistance of the Panel, Arbitrator Silverman concluded that the parties' ground rules required the Union "to sign the proffered agreement within ten days of finalization of the agreement."¹²

Soon after the Agency invoked arbitration, President Biden issued Executive Order 14003 (the executive order) revoking several executive orders

³ Shapiro Exceptions, Joint Ex. 1, Collective-Bargaining Agreement at 121.

⁴ Shapiro Award at 8.

⁵ *Id.* at 16.

⁶ *E.g.*, *id.* at 17 ("[T]he [p]arties had engaged in some 120 hours of bargaining, and had exchanged more than 45 sets of proposals and counter-proposals.")

⁷ *Id.* at 16 (noting that the parties were "were obligated under the ground rules to engage in bargaining for eight weeks . . . before any consideration of impasse could be raised"); *id.* at 17-18 (noting that both the ground rules and § 7119 of the Statute permit either party to declare impasse without mutual agreement).

⁸ Shapiro Exceptions, Attach. 4, Union's Post-Hrg. Br. at 24 ("[T]he [A]rbitrator must examine the course of negotiations to determine whether both parties' positions had become so fixed that the parties were deadlocked on all outstanding proposals and

could not continue to make progress by continuing negotiations.")

⁹ Shapiro Award at 18.

¹⁰ *Id.*

¹¹ *Id.* at 19 ("The Union's claim that the Agency's proposal on telework is a permissive subject of bargaining, and[,] thus[,] could not legitimately have been submitted to the [Panel] for resolution, is not persuasive.")

¹² Silverman Award at 7. The Arbitrator arrived at this ten-day deadline by erroneously relying on a proposal that was rejected during the parties' ground-rules negotiation. The final wording of the ground rules provides that the "Union will complete the ratification process within [thirty] days of the execution date of an agreement." Silverman Exceptions, Joint Ex. 2, Ground Rules at 6 (emphasis added). We discuss this further in Section IV.B.1 below.

issued by President Trump.¹³ The executive order instructed “heads of agencies . . . [to] review and identify existing agency actions related to or arising from th[e revoked executive] orders.”¹⁴ The executive order also stated that the “heads of affected agencies shall, as soon as practicable, suspend, revise, or rescind . . . actions identified in the review.”¹⁵

Before Arbitrator Silverman, the Union argued that the executive order prohibited the parties from executing the compiled agreement until they renegotiated provisions affected by revocation of the Trump executive orders. Arbitrator Silverman rejected this argument, finding that the executive order “is not a directive to . . . parties engaged in negotiations, but to [h]eads of [a]gencies to take certain actions.”¹⁶

As a remedy, Arbitrator Silverman directed the Union to execute the compiled agreement and stated that the compiled agreement “may be submitted to the [h]ead of the [a]gency for appropriate action pursuant to the [Statute] and [the executive order].”¹⁷

The Union filed exceptions to the Silverman Award on December 3, 2021, and the Agency filed an opposition on January 18, 2022.

III Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar one of the Union’s exceptions.

The Union argues that the Silverman award is contrary to public policy. According to the Union, the executive order requires the Agency head to disapprove several provisions of the compiled agreement. Under the parties’ ground rules, the Union argues that this disapproval will trigger a complete renegotiation of the agreement.¹⁸ And the Union contends that this will result in unnecessary expense that conflicts with the alleged public policy of an “efficient and effective government.”¹⁹

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that could have been, but were not, presented to

the arbitrator.²⁰ Although the Union argued before Arbitrator Silverman that Agency-head review of the compiled agreement was unlawful,²¹ nothing in the record indicates that the Union raised the cost of disapproval as an argument against submitting the agreement to Agency-head review. Thus, we do not consider this exception.²²

IV. Analysis and Conclusions

A. The Union does not demonstrate that the Shapiro award is deficient.

1. The Shapiro award is not based on a nonfact.

The Union argues that the Shapiro award is based on a nonfact.²³ To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²⁴

The Union challenges Arbitrator Shapiro’s assertion that it was “impossible to know” whether the parties could have made more substantive progress in the first mediation.²⁵ Given the parties’ progress in the second mediation, the Union argues that the Arbitrator could have found that the parties had potential for further productive discussions during the first mediation and, thus, were not at impasse.²⁶

Regarding the first meditation, Arbitrator Shapiro found that the “failure of the mediation process to produce any meaningful advances was based largely” on the Union’s refusal to cooperate.²⁷ The Union’s cooperation in subsequent, *Panel-imposed* mediation does not retroactively affect whether an impasse existed prior to the Agency invoking the Panel’s assistance. Thus, the Union has not established that the Arbitrator’s refusal to “engage in speculation” about possible grounds for agreement was clearly erroneous or central to the award.²⁸ Consequently, we deny this exception.²⁹

¹³ Protecting the Federal Workforce, Exec. Order No. 14,003 (Jan. 22, 2021), 86 Fed. Reg. 7,231 (Jan. 27, 2021).

¹⁴ *Id.*

¹⁵ *Id.* at 7,232.

¹⁶ Silverman Award at 7.

¹⁷ *Id.*

¹⁸ Silverman Exceptions Br. at 43.

¹⁹ *Id.* at 43-44 (citing 5 U.S.C. § 7101).

²⁰ 5 C.F.R. §§ 2425.4(c), 2429.5.

²¹ Silverman Exceptions, Attach. 5, Union’s Post-Hrg. Br. at 48, 55, 58 (arguing that submitting compiled agreement for Agency-head review would be contrary to the executive order and Authority precedent).

²² See *NFFE, Loc. 1953*, 72 FLRA 306, 306 n.7 (2021) (*Loc. 1953*) (dismissing exceptions that could have been, but were not, raised before the arbitrator).

²³ Shapiro Exceptions Br. at 45.

²⁴ *AFGE, Loc. 17*, 72 FLRA 162, 163 (2021) (Member Abbott concurring); *NLRB Prof’l Ass’n*, 68 FLRA 552, 554 (2015).

²⁵ Shapiro Exceptions Br. at 45.

²⁶ *Id.* at 46.

²⁷ Shapiro Award at 18.

²⁸ *Id.*

²⁹ See *AFGE Council of Prisons Locs. Council 33*, 68 FLRA 757, 759 (2015) (denying nonfact exception where excepting party failed to establish that arbitrator made a clear factual error).

2. The Union's exception arguing that the Agency engaged in "take it or leave it" bargaining mischaracterizes the award.

The Union asserts that Arbitrator Shapiro's failure to find that the Agency's conduct during the first mediation evidenced bad-faith bargaining is contrary to Authority precedent. According to the Union, Arbitrator Shapiro "conclude[d] that the Agency was entitled to present its . . . proposals on a 'take it or leave it' basis and terminate mediation without engaging in any bargaining."³⁰ However, Arbitrator Shapiro concluded that the "failure of the mediation process to produce any meaningful advances was based largely on the Union's unwillingness [to] present its questions about the Agency's . . . [proposals] to the Agency;" the Union's refusal to identify proposals that it would accept; and the Union's insistence on returning to direct bargaining without mediation.³¹ Based on these findings, the Arbitrator concluded that the Agency was "justified" in requesting release from the mediation.³² Thus, contrary to the Union's assertion, the Arbitrator did not find that the Agency was entitled to terminate mediation without engaging in any bargaining.

Because the Union's exception relies on a mischaracterization of the award, it does not provide grounds for finding the award deficient.³³

Accordingly, we deny this exception.

3. The Union does not establish that Arbitrator Shapiro's finding of impasse is contrary to Authority precedent.

The Union argues that the award is contrary to law because Arbitrator Shapiro failed to consider whether

the Agency acted in bad faith before May 7.³⁴ Absent a successful nonfact exception, challenges to an arbitrator's evaluation of the evidence, including the weight to be accorded such evidence, do not establish that an award is contrary to law.³⁵

Arbitrator Shapiro made extensive factual findings related to the parties' conduct over the full ten weeks of negotiations before the Agency declared impasse.³⁶ Concerning the Union's allegations of bad-faith bargaining before May 7, Arbitrator Shapiro noted that those earlier Agency actions "may inform a judgment about whether the [p]arties were actually at an impasse."³⁷ To the extent that the Union raised these Agency actions as separate unfair labor practices, the Arbitrator found that they were outside the scope of arbitration because the Union did not raise these claims in its grievance.³⁸ The Union does not cite any authority that required the Arbitrator to consider Agency conduct that the Union failed to challenge in its grievance. In any event, the Arbitrator addressed the Agency's pre-May-7 conduct in assessing whether the parties had reached impasse.³⁹ The Union's argument—that Arbitrator Shapiro should have found these actions demonstrated that no impasse existed—challenges the Arbitrator's evaluation of the evidence presented at arbitration. Thus, we deny this exception.⁴⁰

The Union also argues that the award is contrary to law because Arbitrator Shapiro's finding of impasse

³⁰ Shapiro Exceptions Br. at 41.

³¹ Shapiro Award at 18.

³² *Id.* ("When May 19 was reached without any substantive input from the Union, the Agency was justified under the ground rules in requesting that [the mediator] release it to present the impasse to the [Panel].").

³³ See *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 323, 325 (2021) (*Pershing*) (Chairman DuBester concurring) (denying exception based on mischaracterization of award); *U.S. DHS, U.S. CBP, El Paso Sector, El Paso, Tex.*, 72 FLRA 253, 255 n.23 (2021) (*El Paso*) (Member Abbott dissenting, in part, on other grounds) (citing *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929 (2018)) (rejecting arguments premised on mischaracterization of award).

³⁴ Shapiro Exceptions Br. at 14.

³⁵ *AFGE, Loc. 1741*, 72 FLRA 501, 503 (2021) (Member Abbott dissenting on other grounds); *AFGE, Loc. 2302*, 70 FLRA 202, 204 (2017) (*Loc. 2302*).

³⁶ Shapiro Award at 17.

³⁷ *Id.* at 8.

³⁸ *Id.* at 7-8 (noting that the parties' agreement states that "[i]ssues not raised by the [p]arties during the grievance procedure may not be raised by either [p]arty or the arbitrator").

³⁹ Shapiro Award at 8 ("[S]ome facts about the interactions between the [p]arties prior to May 7 may inform a judgment about whether the [p]arties were actually at an impasse at that time."); *id.* at 16-17 ("[B]ased on the Union's own assertions about the course of the telephone bargaining, it cannot be concluded that the Agency was using that arrangement to stifle negotiations or otherwise prevent agreement on outstanding proposals.").

⁴⁰ See *Loc. 2302*, 70 FLRA at 204 (denying contrary-to-law exception where union argued that the arbitrator "discounted facts" presented at arbitration); *U.S. DHS, U.S. CBP*, 65 FLRA 356, 362 (2010) (denying contrary-to-law exception where agency argued arbitrator failed to credit certain testimony and evidence presented at arbitration).

differed from past arbitral and Authority decisions.⁴¹ Arbitrator Shapiro conducted a factual inquiry into the entire course of the parties' bargaining, including the number of proposals exchanged, the subject areas discussed, the scope of the remaining disagreements, and the parties' conduct.⁴² The Union challenges this analysis by citing cases where arbitrators and administrative law judges found, under distinguishable circumstances, that an impasse existed.⁴³ Merely identifying cases in which arbitrators or judges found that *other parties* were not at impasse does not establish that Arbitrator Shapiro erred as a matter of law in finding that *these parties* were at impasse. Moreover, the Union's exceptions challenge the Arbitrator's weighing of the evidence. Thus, these exceptions do not provide a basis for finding the award deficient.⁴⁴

4. Arbitrator Shapiro did not find that the ground rules contained a waiver of the Union's right to bargain until impasse.

Characterizing the award as stating that either party could declare impasse after eight weeks of bargaining—regardless of whether an actual impasse existed—the Union argues that the award is contrary to law because the parties' ground rules did not contain an

explicit waiver of the Union's right to bargain until impasse.⁴⁵ According to the Union, Arbitrator Shapiro's finding that the Agency could declare impasse after eight weeks was tantamount to concluding that the Union waived its right under § 7114 of the Statute to meet "as frequently as may be necessary" until agreement or impasse.⁴⁶

Here, Arbitrator Shapiro found that the parties "were obligated under the ground rules to engage in bargaining for eight weeks . . . before any consideration of impasse could be raised."⁴⁷ As the parties had negotiated for ten weeks, the Arbitrator found that the ground rules permitted the Agency to declare impasse *if* the parties were unable to resolve their remaining disputes.⁴⁸ After evaluating the course of bargaining, the Arbitrator then determined that the Agency's declaration of impasse was not "premature or made in bad faith."⁴⁹ Thus, contrary to the Union's assertion, the Arbitrator did not find that the ground rules contained a waiver of the Union's right to bargain until impasse. Instead, the Arbitrator found that the parties had bargained for the minimum amount of time necessary under the ground rules and, separately, that the parties had reached impasse.⁵⁰ Because the Union's exception mischaracterizes the award, it fails to provide grounds for finding the award deficient.⁵¹

⁴¹ Shapiro Exceptions Br. at 26 (arguing no impasse because parties not deadlocked on all outstanding proposals); *id.* at 31 (arguing no impasse because parties successfully bargained after May 7); *id.* at 38 (arguing no impasse because Union indicated it had further counterproposals). To the extent that the Union relied on arbitral awards, we note that the Authority has long held that arbitral awards are not precedential. *See, e.g., U.S. Dep't of VA, Member Servs. Health Res. Ctr.*, 71 FLRA 311, 312 (2019) (then-Member DuBester concurring) (citing *AFGE, Loc. 2328*, 70 FLRA 797, 798 n.18 (2018)).

⁴² Shapiro Award at 17.

⁴³ *Compare VA, Wash., D.C. & VA Med. Ctr., Leavenworth, Kan.*, 32 FLRA 855, 872-74 (1988) (upholding judge's finding of no impasse where agency representatives misled union concerning status of negotiations, refused to discuss certain proposals, and walked out of a bargaining meeting when the union raised these topics), *with* Shapiro Award at 17-18 (finding that the parties had bargained on all outstanding proposals and that the failure of mediation to "produce meaningful advances was based largely on the Union's unwillingness" to present questions or areas of agreement with the Agency's proposals). *Compare Dep't of the Treasury, U.S. Customs Serv. Region VIII, S.F., Cal.*, 9 FLRA 606, 616-17 (1982) (finding no impasse where agency implemented policy and then reached further agreements with union "almost immediately after implementation"), *and U.S. Dep't of the Air Force, Space Sys. Div. L.A. Air Force Base, Cal.*, 38 FLRA 1485, 1503-04 (1991) (no impasse where parties continued trading proposals and agreeing to changes after the agency implemented new policy), *with* Shapiro Award at 18 (finding that, after the Agency declared impasse, the Union refused to engage in mediation or respond to the Agency's proposals).

⁴⁴ *See U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 293, 296 (2021) (Member Abbott concurring on other grounds; Member Kiko concurring on other grounds) (denying contrary-to-law exception where excepting party disagreed with arbitrator's factual finding); *AFGE, Loc. 331*, 67 FLRA 295, 296 (2014) (denying contrary-to-law exception that "merely challenge[d] the [a]rbitrator's weighing of the evidence" and did "not claim that those determinations [were] nonfacts").

⁴⁵ Shapiro Exceptions Br. at 18.

⁴⁶ *Id.* (arguing that the duty to bargain in good faith under the Statute requires the parties to meet "as frequently as may be necessary" (quoting 5 U.S.C. § 7114(b)(3))).

⁴⁷ Shapiro Award at 16.

⁴⁸ *Id.*

⁴⁹ *Id.* at 17.

⁵⁰ *Id.* at 16-17.

⁵¹ *See Pershing*, 72 FLRA at 325 (denying exception based on mischaracterization of award); *El Paso*, 72 FLRA at 255 n.23 (rejecting arguments premised on mischaracterization of award). Additionally, § 7119 of the Statute permits either party to request Panel assistance if voluntary arrangements—such as meditation—fail to resolve the parties' disagreements. 5 U.S.C. § 7119(b)(1). Therefore, the Arbitrator's finding that the Agency properly invoked the services of the Panel does not conflict with the Statute.

Based on the above, we deny this exception.

5. The Agency did not insist to impose over a permissive subject of bargaining.

The Union argues that the award is contrary to law because Arbitrator Shapiro failed to find that the Agency's telework proposal was a permissive subject of bargaining.⁵² Bargaining proposals that require a party to waive a statutory right are permissive.⁵³ According to the Union, the proposal constitutes a waiver of the Union's statutory right to bargain over changes to the telework policy because the proposal gives the Agency the discretion to unilaterally change telework guidelines.⁵⁴ However, the Authority has held that language in an agreement does not constitute a waiver of bargaining rights if the language does nothing more than permit a party to "act unilaterally."⁵⁵ Moreover, giving an agency the right to act unilaterally with regard to a mandatory subject of bargaining does not convert that mandatory subject to a permissive one.⁵⁶

Here, the Union does not dispute that telework is a mandatory subject of bargaining.⁵⁷ The Agency's proposal states that various subdivisions of the Agency "may establish general guidelines for all employees" concerning the telework policy and set "other general expectations for all teleworkers."⁵⁸ In other words, the proposal gives the Agency discretion to act unilaterally in managing the scope and operation of the telework policy. Consistent with the above principles, Arbitrator Shapiro correctly found that the proposal was not permissive.⁵⁹

Accordingly, we deny this exception.

- B. The Union does not demonstrate that the Silverman award is deficient.

1. The Union's nonfact exceptions do not establish that the Silverman award is deficient.

The Union argues that the Silverman award is based on two nonfacts.⁶⁰

⁵² Shapiro Exceptions Br. at 44. In *U.S. DOD, Domestic Dependent Elementary & Secondary Sch.*, a union filed a grievance "directly contesting the Panel's order" by claiming that the Panel lacked jurisdiction to hear the matter. 72 FLRA 601, 603 (2021) (Chairman DuBester concurring). An arbitrator sustained the union's grievance and concluded that the Panel "should not have issued a decision." *Id.* The Authority found that the award was contrary to the statutory framework for review of Panel orders. Here, rather than appealing the Panel's order, the Union challenges the Agency's conduct. Shapiro Exceptions Br. at 44 ("[T]he Agency committed an unfair labor practice by submitting a permissive proposal to the [Panel]."). Thus, we note that neither the Union's grievance nor Arbitrator Shapiro's consideration of it circumvent the statutory framework for reviewing Panel orders.

⁵³ *NTEU*, 64 FLRA 982, 985 (2010) (*NTEU*) (citing *FAA, Nw. Mountain Region, Seattle, Wash. & FAA, Wash. D.C.*, 14 FLRA 644, 649 (1984)).

⁵⁴ Shapiro Exceptions Br. at 44.

⁵⁵ *NTEU*, 64 FLRA at 985 (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C. & IRS, Cincinnati, Ohio Dist. Off.*, 37 FLRA 1423, 1429 (1990) (*IRS*)).

⁵⁶ *Id.* (noting that, although provisions "allowed the [a]gency to act unilaterally[,] . . . under Authority precedent, that alone is insufficient to transform them into a waiver of the [u]nion's statutory right to bargain"); *IRS*, 37 FLRA at 1430 ("The fact that the parties agreed that, for certain actions, the [agency] could act unilaterally does not support a conclusion that the provision constituted a permissive subject of bargaining . . . [i]nstead, the subject matter of the provisions . . . was and remained a mandatory subject of bargaining.").

⁵⁷ Shapiro Exceptions Br. at 42-43 (arguing that "telework policies are subject to bargaining with the exclusive representative and any changes to the Agency's telework program must be negotiated with the Union").

⁵⁸ *Id.* at 43.

⁵⁹ Shapiro Award at 19 ("The Union's claim that the Agency's proposal on telework is a permissive subject of bargaining, and[,] thus[,] could not legitimately have been submitted to the [Panel] for resolution, is not persuasive.").

⁶⁰ Silverman Exceptions Br. at 38-39, 41.

In the first nonfact exception, the Union argues that Arbitrator Silverman relied on a clearly erroneous fact to find that the Union violated the ground rules.⁶¹ During the parties' ground-rules negotiations, the Agency proposed a ten-day deadline for the Union to execute a completed agreement.⁶² The Union rejected this proposal, and the final wording of the ground rules provides that the "Union will complete the ratification process within [thirty] days of the execution date of an agreement."⁶³ Relying on the rejected proposal—rather than the relevant provision of the parties' ground rules—Arbitrator Silverman found that "the Union was required to sign the proffered agreement within ten days of finalization of the agreement."⁶⁴ It is undisputed that Arbitrator Silverman erred in this regard.⁶⁵ Even so, the Union failed to execute the agreement before the thirty-day deadline that the parties agree the Arbitrator should have applied.⁶⁶ Thus, the Union has not established that the result would have been different if the Arbitrator had properly applied the ground-rules agreement. Consequently, we deny this exception.⁶⁷

The Union also argues that Arbitrator Silverman misinterpreted the Shapiro award and the Panel decision.⁶⁸ According to the Union, Arbitrator Shapiro and the Panel both found that the parties were at impasse, and Arbitrator Silverman then improperly expanded that finding to establish that the Agency did not engage in *any* bad-faith bargaining before declaring impasse.⁶⁹

However, this argument mischaracterizes the Silverman award. Arbitrator Silverman concluded that the relevant question for assessing the Union's alleged

violation of the ground rules was whether the parties were at an impasse. Thus, just like Arbitrator Shapiro, Arbitrator Silverman did not even consider the Union's unfair-labor-practice allegations against the Agency.⁷⁰ As Arbitrator Silverman did not improperly expand the findings of either Arbitrator Shapiro or the Panel as the Union alleges, the Union's exception fails to establish that the award relied on a nonfact. Therefore, we deny this exception.⁷¹

2. The Union does not demonstrate that Arbitrator Silverman's application of *res judicata* to preclude the Union from relitigating the issue of impasse was deficient.

The Union argues that Arbitrator Silverman improperly applied the doctrine of *res judicata* to Arbitrator Shapiro's, and the Panel's, finding of impasse.⁷² In the Union's view, because arbitral awards are not binding on future arbitrators without agreement of the parties, *res judicata* does not apply to such awards.⁷³

The Authority has held that arbitrators have discretion to give preclusive effect to other arbitrators' awards.⁷⁴ The Authority normally defers to those determinations "because the arbitrator is 'making determinations that constitute factual findings and reasoning.'" ⁷⁵ Even an arbitrator's mistaken belief concerning the preclusive effect of an earlier award does not provide a basis for finding an award deficient.⁷⁶ As Arbitrator Silverman had discretion to give preclusive

⁶¹ *Id.* at 41.

⁶² *Id.*; Opp'n Br. at 48 n.13.

⁶³ Silverman Exceptions, Joint Ex. 2, Ground Rules at 6.

⁶⁴ Silverman Award at 7.

⁶⁵ Opp'n Br. at 48 n.13 (noting that the Agency contacted the Union and Arbitrator Silverman to notify them of the Arbitrator's error in citing the rejected proposal; Arbitrator Silverman indicated that a corrected award is forthcoming; and, as of the filing of the Agency's opposition, "Arbitrator Silverman ha[d] yet to issue corrections").

⁶⁶ Silverman Award at 7 (directing as a remedy that the Union execute the compiled agreement).

⁶⁷ See *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Or.*, 68 FLRA 178, 182-83 (2015) (denying nonfact exception where excepting party did not demonstrate that the arbitrator would have reached different result if not for the alleged nonfact).

⁶⁸ Silverman Exceptions Br. at 38-39.

⁶⁹ *Id.*

⁷⁰ Silverman Award at 6 (noting that the relevant issue was "whether the parties had actually reached an impasse when the Agency terminated the direct negotiations").

⁷¹ See *Pershing*, 72 FLRA at 325 (denying exception based on mischaracterization of award); *El Paso*, 72 FLRA at 255 n.23 (rejecting arguments based on mischaracterization of award).

⁷² Silverman Exceptions Br. at 26. The Agency argues that the Authority should dismiss the Union's *res judicata* exceptions because the Union "could have raised these arguments to Arbitrator Silverman[] but failed to do so." Silverman Opp'n Br. at 14. However, the Union argued in its post-hearing brief to Arbitrator Silverman that the Agency could not "rely on any findings made by Arbitrator Shapiro to meet its burden of proof in this case, as the decision is not final and has no precedential value to resolve any issue in this case." Silverman Exceptions, Attach. 5, Union's Post-Hrg. Br. at 32 n.42. We find that this argument was sufficient to preserve the Union's *res judicata* arguments before the Authority. See *U.S. DOD, Def. Educ. Activity*, 60 FLRA 254, 256 (2004) (finding that a party properly preserved an argument by raising it in post-hearing brief (citing *SSA, Off. of Hearings & Appeals, Falls Church, Va.*, 59 FLRA 507, 510 (2003))).

⁷³ Silverman Exceptions Br. at 32.

⁷⁴ *NAIL, Loc. 10*, 71 FLRA 513, 514 (2020) (*NAIL*) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 205 (2016) (Member Pizzella dissenting, in part, on other grounds)).

⁷⁵ *Id.* (citing *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 314 (2015)).

⁷⁶ *AFGE, Loc. 2459*, 51 FLRA 1602, 1607 n.5 (1996) (*Loc. 2459*).

effect to the Shapiro award, the Silverman award is not contrary to law. Thus, we deny this exception.⁷⁷

The Union also argues that Arbitrator Silverman did not comply with the Authority's holding in *U.S. Department of the Air Force, Scott Air Force Base, Illinois (Scott AFB)*⁷⁸ concerning when the Authority will give preclusive effect to a prior Authority decision.⁷⁹ In *Scott AFB*, the Authority adopted the requirements that courts use when applying the doctrine of res judicata to prior judicial decisions.⁸⁰ Arbitration awards generally do not bind future arbitrators, so an arbitrator who decides to give a prior arbitration award preclusive effect is not obligated to do so in the same manner that a court or the Authority would decide a similar issue.⁸¹

Here, the Union argues that the award is contrary to *Scott AFB* because (1) the Shapiro award was not final,⁸² (2) the Shapiro award concerned different issues from those before Arbitrator Silverman;⁸³ and (3) the Panel's decision concerned different issues from those before Arbitrator Silverman.⁸⁴ However, *Scott AFB* does not apply to Arbitrator Silverman's determination to give preclusive effect to the impasse finding in the Shapiro award.⁸⁵ Thus, these arguments do not provide grounds for finding the award deficient, and we deny these exceptions.⁸⁶

3. The Union does not establish that either the executive order or the Statute requires the parties to reopen negotiations before Agency-head review.

The Union argues that the award is contrary to law because the executive order required the parties to return to the bargaining table to renegotiate three provisions of the compiled agreement.⁸⁷ According to the Union, Authority precedent prevents parties from submitting incomplete agreements for agency-head review.⁸⁸ The Union also argues that the award impermissibly directs the Agency to submit an agreement to Agency-head review that "contains provisions [that] violate [the executive order]."⁸⁹

The executive order instructs heads of agencies to review existing agency actions that relied on the revoked executive orders and, "as soon as practicable, [to] suspend, revise, or rescind" those actions.⁹⁰ Arbitrator Silverman found that the executive order "is not a directive to . . . parties engaged in negotiations, but to [h]eads of [a]gencies."⁹¹ Thus, rather than directing the parties to return to the negotiation table before Agency-head review, Arbitrator Silverman stated that the "contract may be submitted to the [h]ead of the Agency for appropriate action pursuant to the [Statute] and the [executive order]."⁹²

⁷⁷ See *NAIL*, 71 FLRA at 514-15 (denying contrary-to-law exception where union challenged arbitrator's exercise of discretion to find a grievance precluded by another arbitrator's prior award). The Union also argues that the award fails to draw its essence from the parties' agreement because the parties did not agree to make awards binding on future arbitrators. Silverman Exceptions Br. at 37. But the Union identifies no provision of the parties' agreement that prohibits Arbitrator Silverman from giving preclusive effect to the Shapiro award. Thus, the Union's essence exception does not demonstrate that the award fails to draw its essence from the parties' agreement. See *NTEU, Chapter 32*, 67 FLRA 354, 355 (2014) (denying essence exception where excepting party did not identify a provision of the parties' collective-bargaining agreement that conflicted with arbitrator's finding and did not otherwise demonstrate that the award was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement).⁷⁸ 35 FLRA 978 (1990).

⁷⁹ Silverman Exceptions Br. at 27, 28, 33.

⁸⁰ 35 FLRA at 982-83. These requirements include: (1) the same issue was involved in an earlier case; (2) the issue was actually litigated in the first case; (3) the resolution of the issue was necessary to the decision in the first case; (4) the decision in the first case—on the issue to be precluded—was final; and (5) the party attempting to re-raise the issue was fully represented at the prior hearing on the precluded issue. *AFGE, Loc. 2258*, 70 FLRA 210, 211 (2017) (citing *U.S. Dep't of Energy, W. Area Power Admin. Golden, Colo.*, 56 FLRA 9, 11 (2000)).

⁸¹ *Loc. 2459*, 51 FLRA at 1607 n.5 (*Scott AFB* does not require arbitrators to apply specific collateral estoppel principles in order to give preclusive effect to other arbitrators' awards, but "[i]f an arbitrator bases an award on principles of issue preclusion under a mistaken belief that *Scott AFB* applies to arbitration awards, that would *not* be grounds for finding the award deficient" (emphasis added)).

⁸² Silverman Exception Br. at 26.

⁸³ *Id.* at 28.

⁸⁴ *Id.* at 33.

⁸⁵ *Loc. 2459*, 51 FLRA at 1607 n.5.

⁸⁶ See *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 373 (2021) (*Nashville*) (Member Abbott concurring) (denying contrary-to-law exception where excepting party failed to demonstrate a conflict between the award and law); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 621 (2014) (denying contrary-to-law exception where excepting party failed to establish the cited law applied).

⁸⁷ Silverman Exceptions Br. at 24 ("[T]he parties still must engage in additional bargaining before there will be a complete agreement that can be submitted for agency[-]head review because the parties must renegotiate Articles 35, 36, and 38 in order to comply with [the executive order].").

⁸⁸ *Id.* at 21.

⁸⁹ *Id.* at 13.

⁹⁰ Exec. Order No. 14,003, 86 Fed. Reg. at 7,231-7,232.

⁹¹ Silverman Award at 7.

⁹² *Id.*

As both the Statute and the executive order instruct heads of agencies to review agreements for consistency with law and government-wide regulations,⁹³ the Union fails to establish that Arbitrator Silverman's direction to submit the compiled agreement for review violates either the Statute or the plain wording of the executive order.

Consequently, we deny this exception.⁹⁴

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

⁹³ 5 U.S.C. § 7114(c) ("An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency . . . [who] shall approve the agreement . . . if [it] is in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation.").

⁹⁴ See *Nashville*, 72 FLRA at 373 (denying contrary-to-law exception where excepting party failed to demonstrate a conflict between the award and an executive order); *U.S. Dep't of Transp., FAA*, 71 FLRA 694, 696 (2020) (Member Abbott concurring in part and dissenting in part) (denying contrary-to-law exceptions where excepting party failed to establish that award was contrary to cited statutory authority); *AFGE, Nat'l Citizenship & Immigr. Servs. Council, Loc. 2076*, 71 FLRA 115, 116 (2019) (then-Member DuBester concurring) (denying contrary-to-law exception where cited authority did not prohibit the agency action permitted by award).

Chairman DuBester, concurring:

I agree that the Union's exceptions are properly denied. However, I write separately to note that the Union did not allege that either Arbitrator Shapiro or Arbitrator Silverman exceeded their authority by failing to decide whether the Agency's actions preceding its declaration of impasse constituted bad-faith bargaining. Therefore, the Authority is constrained from addressing that question in today's decision.*

* *U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base, Elmendorf-Richardson, Alaska*, 71 FLRA 781, 784 (2020) (Dissenting Opinion of then-Member DuBester) (“[p]arties

should be provided the opportunity to address and, if possible, rebut arguments presented for our review in exceptions from arbitration awards”).